IN THE UNITED STATES BANKRUPTCY COURT FOR THE EASTERN DISTRICT OF TENNESSEE

In re

Case No. 99-34084

THE COMEDY COLLEGE, L.P.
d/b/a GLASGOW COMEDY THEATER

Debtor

MEMORANDUM ON BANKFIRST'S
MOTION FOR RELIEF FROM THE AUTOMATIC STAY

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RICHARD STAIR, JR.
UNITED STATES BANKRUPTCY JUDGE

Before the court is the Motion for Relief from the Automatic Stay (Motion) filed on April 3, 2000, by BankFirst. By its Motion, BankFirst seeks modification of the automatic stay so that it may foreclose on the Debtor's interest in certain real property in Sevier County, Tennessee. Ann Mostoller, the Chapter 7 Trustee, filed an Objection to Motion to Modify Automatic Stay and Abandon Property on April 13, 2000. A final hearing was held on BankFirst's Motion on May 15, 2000.

This is a core proceeding. 28 U.S.C.A. § 157(b)(2)(G) (West 1993).

I

The Debtor operated a dinner theater on real property located in the city of Pigeon Forge in Sevier County, Tennessee. It held the property under the terms of a Lease executed on January 30, 1998, by it, as lessee, and the city of Pigeon Forge, as lessor. The Lease was for a term of twenty years and included both an option to extend the Lease and an option to purchase the property.

Article X of the Lease, entitled "Default; Remedies," provides that the following shall be deemed acts of default by the Lessee:

> a) Failure to pay any rent, the taxes, or the premiums on the insurance required, all as provided for hereinabove, or any part thereof, for a period of fifteen (15) days after written notice . . . .
>
> b) Failure to do, observe, keep and perform any of the other terms, covenants, agreements, and provisions in this Lease which are the duty of the Tenant to do, observe, keep or perform for a period of thirty (30) days after similar written notice . . . .

c) The abandonment of the premises by Tenant . . . . The closing of the theater during the seasonal period, January - March, shall not constitute an abandonment pursuant to this provision.

The Lease also permitted the Debtor to use the Lease to secure financing for the construction of improvements on the property. It provides at Article XIV, "Assignment of Lease for Collateral Purposes," in material part:

d) The Landlord will accept performance by the holder of any such mortgage and/or security interest in the leasehold estate of any obligation of this Lease required to be performed by the Tenant, with the same force and effect, and under the same terms and conditions, including the option to purchase, as though performed by Tenant . . . . The holder of any such mortgage and/or security interest shall have seventy (70) days after receipt of any such notice of default (i.e. ten (10) days longer than Tenant has) within which to cure any default in the payment of applicable Rent . . . and a reasonable time within which to cure any other default, provided all monetary obligations of every kind are promptly met by the mortgagee.

e) If the Landlord shall elect to terminate this Lease by reasons of any default of Tenant, the holder of the mortgage and/or security interest shall not only have the right to nullify any notice of termination by curing such default, as provided in d) above, but shall also have the right to postpone and extend the specified date for the termination of this Lease . . . in its notice of termination, for a period of not more than six (6) months, provided that the holder of the mortgage and/or security interest within the above specified seventy (70) days shall cure or cause to be cured any then existing money defaults and meanwhile pay when due all monetary obligations . . . and comply with and perform all of the other terms . . . of this Lease on Tenant's part . . . .

The Debtor obtained financing from BankFirst and used its Lease to secure the debt. On January 30, 1998, the Debtor executed a Promissory Note in favor of BankFirst in the principal amount of $4,700,000.00 and a Tennessee Leasehold Mortgage Deed of Trust with Security Agreement and Assignment of Rents and Leases (Includes Fixture Filing Under Uniform

Commercial Code) (Deed of Trust).[1] Article III of the Deed of Trust, covering "ASSIGNMENT OF RENTS AND LEASES" provides in material part:

> 3.1 Assignment of Rents and Leases. . . . Grantor [Debtor] hereby further assigns to Beneficiary [BankFirst] all of Grantor's rights in all existing and future leases, including subleases, any and all extensions, renewals, modifications, and replacements thereof, and all guaranties of tenants' performance thereunder, upon any part of the Mortgaged Property (the "Leases"). It is understood and agreed by the parties that this assignment is intended to be and is an absolute assignment from Grantor to Beneficiary, and not merely the passing of a security interest; provided, however, that prior to an Event of Default, Grantor shall have a license, without joinder of Beneficiary, to enforce the Leases and to collect the Rents as they come due and to retain, use and enjoy the same.

Article V of the Deed of Trust sets forth the "EVENTS OF DEFAULT" and provides in material part:

> The occurrence of any one or more of the following events shall constitute an Event of Default hereunder:
>
> 5.1 Failure to Pay Obligations. If Grantor shall fail to pay any part of the Obligations, whether principal, interest or expenses, promptly when the same becomes due and such failure is not cured with [sic] 10 days following written notice from Bank . . . .[2]

Article VI of the Deed of Trust sets forth the "REMEDIES" and provides in material part:

> If an Event of Default shall occur, Beneficiary may exercise any one or more of the following remedies:
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> 6.1 Acceleration. Beneficiary may declare the entire Obligations, principal and interest, immediately due and payable without notice or demand, the same being hereby expressly waived.

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[1] The Debtor also granted BankFirst an interest in various items of personal property to secure the debt in a Security Agreement executed that day. On the same date, BankFirst and the city of Pigeon Forge executed an Estoppel, Non-Disturbance and Attornment Agreement.

[2] The Deed of Trust defines "Obligations" to include, among other documents, the January 30, 1998 Promissory Note.

On September 22, 1999, BankFirst notified the Debtor by letter that the Promissory Note was in default for non-payment and that it had elected to accelerate the note. It declared the entire balance due and owing and demanded payment by October 8, 1999, of $4,857,756.65 which it determined to be the sum of principal, interest, and late fees owing. The Debtor received the letter on September 24, 1999.

On October 6, 1999, the Debtor filed a petition under Chapter 11. As evidenced by the monthly operating report filed by the Debtor on January 28, 2000, the Debtor continued to operate its business until at least December 31, 1999. Its case was converted to Chapter 7 on March 3, 2000. One month later, BankFirst filed the instant Motion to obtain relief from the automatic stay seeking to foreclose on the Debtor's interest in the leasehold estate. At the May 15, 2000 hearing, BankFirst employee David Butler testified that as of the date of the hearing the balance outstanding on the debt was $5,164,345.22, which represents $4,981,400.22 owed by the Debtor on the date it filed its Chapter 11 petition, $179,945.00 in interest accrued since that date, and $3,000.00 in additional late fees. Interest on the debt accrues at the rate of $1,241.00 each day.

In addition to its default under the Promissory Note, the Debtor failed to pay the rent as required under the Lease. James Philip Glasgow, who is the president of the Debtor's general partner and who ran the Debtor's daily operations, testified that he and a representative of the city of Pigeon Forge had discussed the Debtor's intentions to reorganize and ideas for payment of the amount due under the Lease, but that the Debtor never received a written notice of default from the city of Pigeon Forge. On May 12, 2000, Ralph E. Chance, the mayor of Pigeon Forge, signed

Resolution No. 604. By that resolution, he and the Board of Commissioners of the city of Pigeon Forge resolved as follows:

> That the City of Pigeon Forge hereby waives the deemed rejection of a certain Lease existing between the City and The Comedy College, L.P. to the extent not prohibited under State law, and said waiver of the deemed rejection is made to the extent 11 USC 365 still applies and both Landlord and Tenant retain their rights and obligations under such section, and said waiver of the deemed rejection is conditioned on the Chapter 7 Bankruptcy Trustee assuming or rejecting the Lease or obtaining an Order further extending the time to assume or reject the lease within ninety (90) days of the date hereof.

The Debtor, while serving as a debtor in possession, did not file a motion to assume or reject the Lease or to extend the time for doing so.

The evidence at the hearing included testimony from two real estate appraisers regarding the value of the Debtor's interest in the leasehold estate. Kenneth R. Woodford testified about the appraisal that he performed at the request of BankFirst and Robert J. Fletcher testified about the appraisal that he performed at the request of the Trustee. The appraisals yielded substantially different valuations, with Mr. Woodford valuing the Debtor's interest at $4,750,000.00 and Mr. Fletcher valuing it at $6,500,000.00. Mr. Woodford concluded in his report that it would take approximately one year to market and sell the property at its fair market value. Mr. Fletcher testified that it could take at least two years.

II

Under § 365 of the Bankruptcy Code, a trustee may assume or reject a debtor's executory contracts and unexpired leases subject to the court's approval. *See* 11 U.S.C.A. § 365(a) (West

1993 & Supp. 2000).[3] The purpose of § 365 is to "enable the trustee to assume those executory obligations which are beneficial to the estate while rejecting those which are onerous or burdensome to perform." *Leasing Serv. Corp. v. First Tenn. Bank Nat'l Assoc.*, 826 F.2d 434, 436 (6th Cir. 1987). Where the debtor's lease is in default, the trustee or debtor in possession must satisfy certain requirements before seeking to assume the lease. *See* 11 U.S.C.A. § 365(b). Those requirements are aimed at curing the default, compensating parties for loss caused by the default, and ensuring future performance under the lease. *See id.*

The time allowed the trustee for determining whether to assume or reject the lease is prescribed by statute. *See id.* at (d). In the present matter, the leased property is nonresidential real property and therefore the decision to assume or reject it is governed by § 365(d)(4), which provides in material part:

> [I]n a case under any chapter of this title, if the trustee does not assume or reject an unexpired lease of nonresidential real property under which the debtor is the lessee within 60 days after the date of the order for relief, or within such additional time as the court, for cause, within such 60-day period, fixes, then such lease is deemed rejected, and the trustee shall immediately surrender such nonresidential real property to the lessor.

11 U.S.C.A. § 365(d)(4).

The parties do not dispute that the Debtor's Lease with the city of Pigeon Forge constitutes an unexpired lease of nonresidential real property. They do not dispute that the debtor in

[3] In Chapter 11, the duties of assumption or rejection under § 365 extend to a debtor in possession. *See* 11 U.S.C.A. § 1107(a) (West 1993); *see also, City of Covington v. Covington Landing, Ltd. Partnership*, 71 F.3d 1221, 1226 (6th Cir. 1995) ("Section 365 permits the trustee or the debtor in possession to assume or reject an executory contract or unexpired lease, with court approval."); *Burger King Corp. v. Rovine Corp. (In re Rovine Corp.)*, 6 B.R. 661, 663 n.* (Bankr. W.D. Tenn. 1982) (explaining that a debtor in possession's authority to assume or reject a contract under § 365 "stems from § 1107 of the Code").

possession did not assume or reject the Lease within the time prescribed by § 365(d)(4) and that it did not request an extension of time within that period. Finally, the parties agree that the Lease has been deemed rejected.[4]

BankFirst seeks relief from the automatic stay pursuant to 11 U.S.C.A. § 362(d)(2) (West 1993 & Supp. 2000) which provides:

> (d) On request of a party in interest and after notice and a hearing, the court shall grant relief from the stay provided under subsection (a) of this section, such as by terminating, annulling, modifying, or conditioning such stay—
>
> > (2) with respect to a stay of an act against property under subsection (a) of this section, if—
> >
> > > (A) the debtor does not have an equity in such property; and
> > >
> > > (B) such property is not necessary to an effective reorganization[.]

BankFirst correctly argues that the leased property is not necessary to an effective reorganization because the Debtor is in Chapter 7 and will be liquidated rather than reorganized. *See Prestwood v. United States (In re Prestwood)*, 185 B.R. 358, 361 (M.D. Ala. 1995); *Rusiski v. Pribonic (In re Pribonic)*, 70 B.R. 596, 606 (Bankr. W.D. Pa. 1987); *In re Goulin Realty, Inc.*, 60 B.R. 283, 283-84 (Bankr. D.R.I. 1986).

BankFirst contends that it is entitled to relief from the stay for two reasons. Its first argument is that the Debtor has no equity in the property because the Lease is deemed rejected under § 365(d)(4). Its second argument is that the Debtor has no equity in the property because

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[4] The Debtor commenced its Chapter 11 case on October 6, 1999. Therefore, it had through December 5, 1999, within which to assume or reject the Lease or obtain additional time within which to act. Having taken no action, the Lease was deemed rejected after December 5, 1999.

the amount of its claim, which is secured by the Debtor's interest in the leasehold estate, exceeds the value of the leasehold estate as estimated by its expert. The Trustee argues that the appraisal conducted by her expert establishes that the value of the leasehold estate exceeds the amount of BankFirst's claim and therefore that the Debtor has equity in the property. She also argues that the city of Pigeon Forge has waived the deemed rejection of the Lease, and that the city is willing to permit a buyer of the property to cure the Lease and step into the shoes of the Debtor.

III

A waiver is defined as "an intentional relinquishment of a known right." *In re THW Enters., Inc.*, 89 B.R. 351, 356 (Bankr. S.D.N.Y. 1988). The parties do not dispute that the city of Pigeon Forge has waived the rejection of its Lease with the Debtor which occurred under § 365(d)(4).

There is a division among the courts on the issue of whether a lessor may waive a deemed rejection of an unexpired lease under § 365(d)(4). *See George v. City of Morro Bay (In re George)*, 177 F.3d 885, 889 (9th Cir. 1999), *cert. denied*, 120 S. Ct. 978 (2000) (recognizing the division but not reaching the issue). Some courts have allowed a waiver of the deemed rejection where the parties display an intent to treat the rejected lease as a continuing lease. *See, e.g., In re T.F.P. Resources, Inc.*, 56 B.R. 112, 116 (Bankr. S.D.N.Y. 1985); *In re Southern Motel Assocs., Ltd.*, 81 B.R. 112, 117 (Bankr. M.D. Fla. 1987). That situation occurs when a lessor continues to accept rent payments from the debtor following a rejection. *See T.F.P. Resources, Inc.*, 56 B.R. at 116; *Southern Motel Assocs., Ltd.*, 81 B.R. at 117. A few courts permitting

waiver have explained that it is necessary in some circumstances in order to avoid rejection of a lease which would result in harsh consequences for debtors. *See, e.g., THW Enters., Inc.*, 89 B.R. at 355 (citing *In re Lew Mark Cleaners Corp.*, 86 B.R. 331, 335 (Bankr. E.D.N.Y. 1988)). Harsh consequences could occur if, for example, a lessor continued to receive rent from a debtor and then suddenly terminated the lease on the ground that it had been breached when it was automatically rejected under § 365(d)(4). *See Lew Mark Cleaners Corp.*, 86 B.R. at 335.

Courts that refuse to allow the waiver of a deemed rejection under § 365(d)(4) cite a lack of statutory authority as the primary reason. *See, e.g., In re Ok Kwi Lynn Candles, Inc.*, 75 B.R. 97, 100 (Bankr. N.D. Ohio 1987); *In re Re-Trac Corp.*, 59 B.R. 251, 257 (Bankr. D. Minn. 1986); *In re Las Margaritas, Inc.*, 54 B.R. 98, 100 (Bankr. D. Nev. 1985). These courts recognize that a trustee's failure to assume an unexpired lease within the time prescribed by § 365(d)(4) leads to a conclusive statutory presumption of rejection which the court has no authority to override. *See, e.g., Cheadle v. Appleatchee Riders Assoc'n (In re Lovitt),* 757 F.2d 1035, 1041 (9th Cir. 1985); *Las Margaritas, Inc.*, 54 B.R. at 99. They explain that the language of the statute clearly prevents courts from retroactively approving the assumption of a lease or granting an extension of time in which to do so once the sixty day period has expired. *See Ok Kwi Lynn Candles, Inc.*, 75 B.R. at 100; *Re-Trac Corp.*, 59 B.R. at 257; *Las Margaritas, Inc.*, 54 B.R. at 99. One court has explained why a waiver would undermine the rationale behind the automatic rejection provisions in § 365:

> Congress clearly intended to deny the Debtor the flexibility it desires, to eliminate uncertainty regarding the status of nonresidential real property leases in bankruptcy cases, and to put the burden of affirmative action upon the Debtor to take the necessary steps within the statutory period to assume its lease.

Las Margaritas, Inc., 54 B.R. at 100; *see also Lovitt*, 757 F.2d at 1041.

The Sixth Circuit has clearly directed bankruptcy courts to exercise their equitable powers "within the confines of the Bankruptcy Code." *Unsecured Creditor's Committee of Highland Superstores, Inc. v. Strobeck Real Estate, Inc. (In re Highland Superstores, Inc.)*, 154 F.3d 573, 579 (6th Cir. 1998). "Bankruptcy courts simply do not have free rein to ignore a statute in exercise of their equitable powers pursuant to 11 U.S.C. § 105." *Id.* at 578-79.

The court is bound to apply the language of § 365(d)(4). The court finds that § 365(d)(4) unambiguously requires that the Lease in this case must be deemed rejected and that it provides no option for waiving the rejection or for approving an assumption of the Lease at this late date. Accordingly, the court concludes that the deemed rejection of the Lease under § 365(d)(4) cannot be waived by the city of Pigeon Forge.

IV

The court will now address the effect of the rejection. With limited exceptions not relevant here, "the rejection of an executory contract or unexpired lease of the debtor constitutes a breach of such contract or lease— (1) if such contract or lease has not been assumed under this section . . . ." 11 U.S.C.A. § 365(g) (West 1993 & Supp. 2000). There is a disagreement among the courts as to whether a rejection under § 365(d)(4) constitutes a termination of an unexpired lease. *See In re Tri-Glied, Ltd.*, 179 B.R. 1014, 1017 (Bankr. E.D.N.Y. 1995) (noting the disagreement and collecting cases). In *In re 6177 Realty Associates, Inc.*, 142 B.R. 1017, 1019 (Bankr. S.D.

Fla. 1992), the court explained that decisions holding that rejection of a lease constitutes its termination under § 365(d)(4) rely primarily on the language of that provision. In that decision, the court cited *In re Giles Associates, Ltd.*, 92 B.R. 695 (Bankr. W.D. Tex. 1988), and *In re Bernard*, 69 B.R. 13 (Bankr. D. Haw. 1986), as examples of such decisions. *See id.* These decisions rest on the idea that when a rejection occurs under § 365(d)(4) "'[t]he breach plus the surrender obligation can only be seen as termination of any of the Trustee's or Debtor's rights in the leasehold.'" *Id*. (quoting *Giles Assocs., Ltd.*, 92 B.R. at 698). From there, the court in *6177 Realty Associates, Inc*. concluded:

> Rejection of a non-residential lease results in termination of the lease. Once the underlying lease is terminated, leasehold mortgagees or sublessees retain no interest that can be pursued in bankruptcy court or state court.
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> . . . .
>
> . . . Depending upon the terms of their mortgage or sublease, these parties may have standing to seek assumption of the underlying lease to protect their rights. But, they must act within the statutorily described sixty (60) days.

Id. (following the *Bernard* and *Giles* decisions).

This line of decisions has been rejected by numerous courts. *See, e.g., Eastover Bank for Savs. v. Sowashee Venture (In re Austin Dev. Co.)*, 19 F.3d 1077, 1081-84 (5th Cir. 1994); *Kopolow v. P.M. Holding Corp. (In re Modern Textile, Inc.)*, 900 F.2d 1184, 1191 (8th Cir. 1990); *Casc Corp. v. Milner (In re Locke)*, 180 B.R. 245, 260-61 (Bankr. C.D. Cal. 1995); *Tri-Glied, Ltd.*, 179 B.R. at 1017-18. Some of these courts emphasize that the effect of rejection under § 365(d)(4) should be analyzed in light of the purpose of the rejection statutes, which has been explained as follows:

> As one commentator put it, "[w]hat the estate's representative is rejecting is the contract or lease *asset*, which conceivably could carry continuing obligations with it into the estate on an administrative basis. Rejection simply prevents the *estate* from unadvisedly stepping into such liabilities. The liabilities are not repudiated; to the contrary, as the rejection-as-breach doctrine is designed to insure, the contract or lease liabilities remain intact after rejection and give the non-debtor party a claim in the distribution of the estate."

Austin Dev. Co., 19 F.3d at 1082 (quoting MICHAEL T. ANDREW, EXECUTORY CONTRACTS IN BANKRUPTCY; UNDERSTANDING "REJECTION," 59 U. COLO. L. REV. 845, 883 (1988)); *Locke*, 180 B.R. at 259; *Tri-Glied, Ltd.*, 179 B.R. at 1018.

With that in mind, the Fifth Circuit in *Austin Development Co.* studied the use of the terms rejection, breach, and termination throughout § 365. *See Austin Dev. Co.*, 19 F.3d at 1082. It determined that rejection does not constitute a termination, noting that the terms "are used differently, but not inconsistently or interchangeably, as some courts have suggested." *Id.* For example, § 365(g) directs that a rejection shall constitute a breach of an unexpired lease, but that in the circumstances outlined in § 365(h)(2) and (I)(2), rejection may result in a termination of the lease. *See id.; see also* 11 U.S.C.A. § 365(g), (h)(2) (West Supp. 2000), and (I)(2) (West 1993).

In addition, a few courts have emphasized that a termination of a lease or contract may unfairly and unnecessarily effect an avoidance of a mortgage or security interest based upon the contract or lease. *See Austin Dev. Co.*, 19 F.3d at 1083; *Locke*, 180 B.R. at 260. They point out that the avoidance powers are extraordinary powers for which Congress has specifically provided in the Bankruptcy Code for particular situations. *See Austin Dev. Co.*, 19 F.3d at 1083; *Locke*, 180 B.R. at 260. Therefore, the courts conclude, it would be uncharacteristic of the Bankruptcy Code to permit a rejection statute to have a silent secondary function as an avoidance statute. *See*

Austin Dev. Co., 19 F.3d at 1083; *Locke*, 180 B.R. at 260. Bankruptcy courts "must be careful not to expand the scope of these statutory powers beyond what is necessary and consistent with the intent of Congress." *Locke*, 180 B.R. at 260.

In addition, the Fifth Circuit has rejected the notion, advanced by the court in *6177 Realty Associates, Inc.*, that a party whose claim is secured by a lease or contract could attempt to assume the lease or contract within the sixty day period set out in § 365(d)(4). *See Austin Dev. Co.*, 19 F.3d at 1081. The court concluded that this possibility was highly problematic, that a process for implementing the possibility was "unnecessarily contrived," and suggested that it would be disruptive to a debtor's "right to assume or reject within 60 days." *See id.* at n.5.

Finally, the court in *Tri-Glied, Ltd.* bolstered its decision that rejection does not constitute termination by discussing the difference between a lease and a leasehold. *See Tri-Glied, Ltd.*, 179 B.R. at 1023. The distinction, the court explained, is that a "'lease', [is] a document which defines a multitude of mutual rights and duties, and a 'leasehold' or the right to possession conveyed by the lease . . . is merely one such right enumerated therein." *Id.* (citing *In re Cheney Bros.*, 12 F. Supp. 605, 608 (D. Conn. 1935)). In other words, leases are "'part contract and part conveyance.'" *Id.* (quoting *In re Sok Jun Kong*, 162 B.R. 86, 95 (Bankr. E.D.N.Y. 1993)). Thus, although "the concept with which the term 'lease' is most often identified remains the conveyance of an estate or leasehold to a tenant, a modern lease is a contract of which such conveyance is merely one aspect." *Id.*

This court finds the latter line of decisions more persuasive on this issue. The decision that the rejection of a lease does not constitute its termination comports with the purpose of § 365, considers the use of the words rejection, breach, and termination through § 365, respects the confines of avoidance powers as they are set forth in the Bankruptcy Code, and reflects that a leasehold interest is but one aspect of an unexpired lease. Accordingly, the court concludes that the deemed rejection of the Lease by operation of § 365(d)(4) did not constitute a termination of the Lease.

V

Several courts have characterized the rejection of an executory contract or unexpired lease under § 365 as an abandonment of the contract or lease from the estate, citing the purpose underlying the statute, which is "'to permit the trustee . . . to use valuable property of the estate and to renounce title to and abandon burdensome property . . . .'" *See Medical Malpractice Ins. Assoc. v. Hirsch (In re Lavigne)*, 114 F.3d 379, 386 (2d Cir. 1997) (quoting *In re Orion Pictures Corp.*, 4 F.3d 1095, 1098 (2d Cir. 1993)); *see also Sipes v. Atlantic Gulf Communities Corp. (In re General Dev. Corp.)*, 84 F.3d 1364, 1375 (11th Cir. 1996) ("'"Section 365 . . . is based on the trustee's long-standing power to abandon obligations burdensome to the estate."'") (quoting from the opinion of the district court, 177 B.R. 1000, 1013 (S.D. Fla. 1995), which it appended to its decision) (quoting *In re Martin Bros. Toolmakers, Inc.*, 796 F.2d 1435 (11th Cir. 1986)); *Metropolitan Airports Comm'n v. Northwest Airlines, Inc. (In re Midway Airlines, Inc.)*, 6 F.3d 492, 494 (7th Cir. 1993) (explaining that a trustee's power under § 365 "reflects the important consideration that the trustee should be able to abandon contracts that impose burdensome liabilities

upon the bankruptcy estate, but should also be allowed to retain favorable contracts that benefit the estate"); *Leasing Serv. Corp.*, 826 F.2d at 437 n.2 (citing authority likening rejection to abandonment); *Tri-Glied, Ltd.*, 179 B.R. at 1018 ("By analogy, the trustee in rejecting a lease is merely abandoning the leasehold in the same way in which he/she would abandon any other property of the estate."); *In re Fashion Two Twenty, Inc.*, 16 B.R. 784, 786 (Bankr. N.D. Ohio 1982) (explaining that rejection under § 365 is rooted in the trustee's power to abandon burdensome property). As abandoned property, the unexpired lease ceases to be property of the bankruptcy estate and "reverts to the position that it occupied prior to the bankruptcy." *Tri-Glied, Ltd.*, 179 B.R. at 1018; *see also In re Argiannis*, 156 B.R. 683, 688 (Bankr. M.D. Fla. 1993) ("The effect of abandonment is to divest the estate of control of the abandoned property and to revest title in the debtor."). For the purposes of this abandonment effect, courts have not drawn a distinction between unexpired leases which are formally rejected and those which are deemed rejected by statute. *See B.N. Realty Assocs. v. Lichtenstein*, 238 B.R. 249, 255 (S.D.N.Y. 1999) (deciding the issue in the context of § 365(d)(1)[5]) (collecting cases).

In the instant matter, the Lease was deemed rejected under § 365(d)(4) and therefore it was abandoned. Thus, the Lease "revert[ed] to the position that it occupied prior to the bankruptcy." *Tri-Glied, Ltd.*, 179 B.R. at 1018. At that time, the Debtor was in default under its Deed of Trust with BankFirst. It had received BankFirst's September 22, 1999 notice of default by certified mail

[5] Section 365(d)(1) provides for the deemed rejection of executory contracts and unexpired leases of residential real property and personal property. *See* 11 U.S.C.A. § 365(d)(1) (West Supp. 2000). Section 365(d)(4) provides for the deemed rejection specific to nonresidential real property. *See id.* at (d)(4). The two provisions operate similarly, with § 365(d)(4) adding a provision that explicitly directs the trustee to surrender the property to the lessor when the lease is deemed rejected. *See id.*

on September 24, 1999. Under the terms of the Deed of Trust, an Event of Default would occur if the Debtor did not cure the Default "with[in] ten days following written notice from Bank[First] . . . ." The ten day deadline had expired on October 4, 1999, causing an Event of Default two days prior to the filing of the Debtor's petition. The Deed of Trust provided that the parties agreed that the Deed of Trust constituted "an absolute assignment from Grantor to Beneficiary, and not merely the passing of a security interest; provided, however, that prior to an Event of Default, Grantor shall have a license, without joinder of Beneficiary, to enforce the leases . . . ."

The assignment of a contract "transfers the assignor's rights against the obligor to the assignee." *Pacific E. Corp. v. Gulf Life Holding Co.*, 902 S.W.2d 946, 959 (Tenn. Ct. App. 1995). "Thus, the assignee succeeds to the assignor's rights under the original agreement." *Id.* Here, the Debtor assigned its rights under the Lease to BankFirst when it executed the Deed of Trust. Following that assignment, BankFirst possessed the rights that the Debtor had possessed under the Lease. The Debtor retained only the license to enforce the Lease. That license was granted to the Debtor by BankFirst and, by its terms, continued only until the occurrence of an Event of Default in the obligations running from the Debtor to BankFirst. An Event of Default did occur on October 4, 1999, before the Debtor filed its petition. At that time, the Debtor's license to enforce the Lease was terminated.

Accordingly, when the Lease was deemed rejected under § 365(d)(4) it was abandoned from the bankruptcy estate and reverted to BankFirst. Because the Lease is no longer property of the estate or property of the Debtor, the protection of the automatic stay no longer applies to the Lease. *See* 11 U.S.C.A. § 362(a) (West 1993 & Supp. 2000) (listing the actions against property

of the estate and property of the debtor which are stayed at the commencement of a bankruptcy case).

VI

In summary, the parties agree that the Lease was deemed rejected under § 365(d)(4). Although the city of Pigeon Forge explicitly waived the deemed rejection, the court finds that waiver ineffective to overcome the deemed rejection that occurred as a matter of law under § 365(d)(4). The deemed rejection of the Lease constituted an abandonment of the Lease from the Debtor's bankruptcy estate. Once abandoned, the Lease reverted to its status prior to the Debtor's bankruptcy. Under the terms of the Debtor's obligation to BankFirst, the Debtor had assigned the Lease to BankFirst and had a license to enforce the Lease until it defaulted in its obligation to BankFirst. Before the commencement of its case, the Debtor defaulted in its obligation to BankFirst and therefore lost its license to enforce the Lease. Thus, when the Lease was abandoned from the estate, it reverted to BankFirst. With respect to BankFirst's request for relief from the automatic stay, such relief is no longer necessary.

An appropriate order will be entered.

FILED: June 9, 2000

BY THE COURT

/s/ Richard Stair, Jr.

RICHARD STAIR, JR.
UNITED STATES BANKRUPTCY JUDGE

IN THE UNITED STATES BANKRUPTCY COURT FOR THE EASTERN DISTRICT OF TENNESSEE

In re

Case No. 99-34084

THE COMEDY COLLEGE, L.P.
d/b/a GLASGOW COMEDY THEATER

Debtor

O R D E R

For the reasons stated in the Memorandum on BankFirst's Motion for Relief From the Automatic Stay filed this date, the court directs that the Motion for Relief From the Automatic Stay filed by BankFirst on April 3, 2000, requesting modification of the automatic stay to allow it to foreclose on the Debtor's interest in certain real property in Sevier County, Tennessee, acquired under the terms of a January 30, 1998 Lease with the city of Pigeon Forge, Tennessee, is DENIED because the Debtor's interest in the Lease has reverted to BankFirst and the Debtor and its bankruptcy estate therefore have no interest in the Lease. Relief from the stay is accordingly unnecessary.

SO ORDERED.

ENTER: June 9, 2000

BY THE COURT

/s/ Richard Stair, Jr.

RICHARD STAIR, JR.
UNITED STATES BANKRUPTCY JUDGE